# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

ORADELL HEALTH CARE CENTER

and

Cases 22-CA-086895 22-CA-089565

1199 SEIU, UNITED HEALTHCARE WORKERS EAST

Bert Dice-Goldberg, Esq., Newark, NJ for the General Counsel. Jedd Mendelson, Esq. (Littler Mendelson, PC), Smithtown, NY for the Respondent. Ellen Dichner, Esq. (Gladstein, Reif & Meginnius, LLP), for the Charging Party.

#### **DECISION**

Steven Fish, Administrative Law Judge: Pursuant to charges and amended charges filed by 1199 SEIU, United Healthcare Workers East (the Union or Charging Party), the Director for Region 22 issued an order consolidating cases, consolidated complaint and notice of hearing on March 26, 2013, alleging that Oradell Health Care Center (Respondent) violated Section 8(a)(1) of the Act in various respects. The trial with respect to the allegations in said complaint was held before me in Newark, New Jersey on May 14, 2013. At the opening of the hearing, General Counsel moved to withdraw paragraph 6 of the complaint, which had alleged an unlawful threatening of employees with reprisal by Respondent's director of education if they voted in favor of the Union. The motion to withdrawal that complaint allegation was granted.

Briefs have been filed by General Counsel and Respondent and have been carefully considered. Based upon the entire record, including my observation of the witnesses and my evaluation of the reliability of the witnesses, I find as follows:

## I. Jurisdiction and Labor Organization

Respondent is a New Jersey limited liability company with an office and place of business in Oradell, New Jersey, where it is engaged in the business of operating a rehabilitation and nursing facility.

During the past year, Respondent derived gross revenues in excess of \$100,000 and purchased and received at its Oradell, New Jersey facility goods and supplies valued in excess of \$5,000 directly from suppliers located outside the State of New Jersey.

Respondent admits, and I so find, that it is and has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and has been a health care institution within the meaning of Section 2(13) of the Act.

#### II. Facts

# A. The Charges and Complaint

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The charge in Case No. 22-CA-086895 was filed by the Union on August 8, 2012 and alleges that Respondent violated Section 8(a)(1) as follows:

## Rider

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In or about June, 2012, the above-named Employer, through its officers, agents and representatives, disciplined Simone Antoine because of her concerted, protected activities on behalf of 1199 SEIU United Healthcare Workers East ("Union").

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In or about July, 2012, the above-named Employer, through its officers, agents and representatives, transferred Simone Antoine from her regular job assignment and to a more onerous assignment because of her concerted, protected activities on behalf of the Union.

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In or about July, 2012, the above-named Employer, through its officers, agents and representatives, suspended Simone Antoine because of her concerted, protected activities on behalf of the Union.

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On August 1, 2012, the above-named Employer, through its officers, agents and representatives, terminated the employment of Simone Antoine because of her concerted, protected activities on behalf of the Union.

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In or about July, 2012, the above-named Employer, through its officers, agents and representatives, disciplined Pearlina Evans because of her concerted, protected activities on behalf of the Union.

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In or about July, 2012, the above-named Employer, through its officers, agents and representatives, transferred Pearlina Evans from her regular job assignment and to a more onerous assignment because of her concerted, protected activities on behalf of the Union.

On September 10, 2012, the Union filed a first amended charge in Case No. 22-CA-086895, alleging that Respondent violated Section 8(a)(1) of the Act as follows:

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### Rider

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Since in or about June, 2012, the above-named Employer, through its officers, agents and representatives, closely monitored employees while at work and on break time because of their activity on behalf of and support for 1199·SEIU United Healthcare Workers East ("Union").

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In or about June 2012, the above-named Employer, through its officers, agents and representatives, prohibited employees from wearing insignia of the Union.

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On or about June 21, 2012, the above-named Employer, through its officers, agents and representatives, threatened employees with discharge if they did not

vote no in the upcoming Union election.

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In or about June, 2012, the above-named Employer, through its officers, agents and representatives, disciplined Simone Antoine because of her concerted, protected activities on behalf of 1199 SEIU United Healthcare Workers East ("Union").

In or about July, 2012, the above-named Employer, through its officers, agents and representatives, transferred Simone Antoine from her regular job assignment and to a more onerous assignment because of her concerted, protected activities on behalf of the Union.

In or about July, 2012, the above-named Employer, through its officers, agents and representatives, suspended Simone Antoine because of her concerted, protected activities on behalf of the Union.

On August 1, 2012, the above-named Employer, through its officers, agents and representatives, terminated the employment of Simone Antoine because of her concerted, protected activities on behalf of the Union.

On September 12, 2012, the Union filed a second amended charge in Case No. 22-CA-086895. Alleging that Respondent violated Sections 8(a)(1), (3) and (5) of the Act and repeated the identical allegations set forth in the Rider to the first amended charge, set forth above.

On September 18, 2012, the Union filed a new charge in Case No. 22-CA-089565 alleging that Respondent violated Section 8(a)(1) of the Act, as follows: "On or about June 27, 2012, the above named Employer, through its officers, agents and representatives, interfered with employees' Section 7 rights by using their photographs in an anti-union video shown to employees of the Employer."

On March 14, 2013, the Union filed a third amended charge in Case No. 22-CA-086895, alleging that Respondent violated Section 8(a)(1) of the Act as follows:

On or about June 21, 2012, the above-named Employer, through its officers, agents and representatives, threatened employees with discharge and/or other reprisals if they did not vote no in the upcoming Union election, or if they otherwise supported the Union.

On or about June 25, 2012, the above-named Employer, through its officers, agents and representatives, interrogated employees about their union activities and created an impression among its employees that their union activities were under surveillance by Respondent.

On March 18, 2013, the Union filed a fourth amended charge in Case No. 22-CA-086895, alleging that Respondent violated Section 8(a)(1) of the Act as follows:

On or about June 21, 2012, the above-named Employer, through its officers, agents and representatives, threatened employees with discharge and/or other reprisals if they did not vote no in the upcoming Union election, or if they otherwise supported the Union.

On or about June 25, 2012, the above-named Employer, through its officers,

agents and representatives, interrogated employees about their union activities, created an impression among its employees that their union activities were under surveillance by Respondent, and asked its employees to ascertain and disclose to Respondent the union membership, activities and sympathies of other employees.

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On March 26, 2013, the Regional Director, as noted, issued an order consolidating cases and consolidated complaint, alleging that Respondent violated Section 8(a)(1) of the Act on June 21, 2012 when Marsha Wong, its director of education, threatened its employees with reprisals if they voted in favor of the Union, and on June 25, 2012, when Afrika Parks, its director of nursing, created the impression among its employees that their union activities were under surveillance by Respondent, interrogated its employees about their union membership activities and sympathies, and asked its employees to ascertain and disclose to Respondent the union membership activities and sympathies of other employees, and during a meeting opposing unions, Respondent showed a Respondent-produced video containing its employees' images, even though the employees had not consented to the use of their images, and even though Respondent had failed to provided a disclaimer, stating that the video did not reflect the views of the employees appearing in it.

The consolidated complaint did not contain any allegations concerning a number of the specific allegations in the charges and amended charges, such as unlawful discipline against Simone Antoine or Pearlina Evans, or the allegations regarding closely monitoring employees, prohibiting employees from wearing insignia of the Union and threatening employees with discharge if they did not vote no in the upcoming election.<sup>1</sup>

# B. Respondent's Operation

Respondent operates a nursing and rehabilitation facility, located in Oradell, New Jersey. John Jeffrey Hoffman is and has been the administrator of Respondent since October of 2010. Afrika Parks was the director of nursing for Respondent from July of 2011 through October of 2012, when she became employed by Respondent's parent company, Care One and Healthbridge Management (Care One), as a clinical services specialist. Marsha Wong is employed as Respondent's director of education.<sup>2</sup>

# C. The Union Organization and Respondent's Campaign

The Union began organizing Respondent's non-professional employees in the spring of 2012. On May 18, 2012, the Union petition to represent Respondent's employees, which resulted in a stipulated election agreement, executed by the parties and approved by the Director of Region 22 on June 5, 2012, scheduling an election for June 29, 2012.

After the petition was filed, the Union continued its organizing, and Respondent embarked on a campaign encouraging employees to vote against the Union. The campaign was orchestrated by Care One, who retained consultants, National Labor Consultants (NLC), to assist in its campaign. Care One officials and NLC representatives conducted meetings of

<sup>&</sup>lt;sup>1</sup> As I related above, the complaint did allege that Respondent by Wong threatened employees with reprisals if they voted in favor of the Union. This complaint allegation was, as stated above, withdrawn at the start of the trial.

<sup>&</sup>lt;sup>2</sup> Respondent admits that both Parks and Wong were supervisors and agents of Respondent during the relevant time periods herein.

groups of 8-10 employees from the petitioned-for-unit. The meetings were held "day and night," employees were informed of the meetings by lists posted at the nurses' stations on the units on which they worked.

During these meetings, and in numerous flyers distributed and posted by Respondent and its consultants, Respondent urged employees to vote no, stressing that the employees do not need a union, that the union representatives were "outsiders," "strangers," "intruders" and a "third party," and that selection of the Union would interfere with supervisors and managers and the employees should not allow a third party to guarantee their future.

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On June 5, 2012, Respondent posted a memo at the time clock, signed by Hoffman, announcing the election details and including the following statement:

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During the next few weeks, we will do everything we can to get you the facts. We believe that when the whole story is known, you will agree that we do not need 1199 SEIU here at Oradell and on June 29 those of you who are eligible to vote will vote NO and keep 1199 SEIU out of our Center and out of our lives.

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Additionally, during the campaign, Respondent distributed to employees free t-shirts, which contained the phrases, "We Are Family" across the back of the shirt and "Oradell Health Center" on the front.

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On June 28, 2012, the Director approved the Union's request to withdraw the petition. Shortly thereafter, Respondent issued a memo to the staff, announcing the petition was withdrawn and that there will not be an election. The memo was signed "Afrika & Jeff" (Parks and Hoffman) and reads as follows:

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I am sure that most of you by now have heard the Great News, that the 1199 SEIU has withdrawn its election petition.

In maintaining our promise that we will keep you informed, I want to share with you that meaning that there will NOT be a union election. We can all get back to our responsibility of caring for our residents without the distraction of a union campaign.

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On behalf of Afrika and myself, we would like to thank you for your patience, support and professionalism though the campaign.

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We believe that 1199 SEIU withdraw the petition because we made it known to the Union that "We Are Family," and we did not want an outsider interfering with our family.

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We thank you for your support, trust, faith and confidence you have shown to the Center, our management team, and Afrika and myself.

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We now can continue our initiatives that were previously started and will work toward resolving your concerns as soon as possible.

Thank you, Afrika & Jeff

## D. The June 27 Meeting and the Video

On June 27, 2012, Respondent held a meeting for employees in its cafeteria. Approximately 100 employees, including eligible voters, supervisory employees and non-supervisory personnel not included in the petitioned-for-unit. Both Hoffman and Parks addressed the employees. They urged employees to vote no in the election (scheduled for June 29) and informed the employees that the facility was a family and they wanted to keep it that way and that the Union would interfere with that family atmosphere. Parks testified that the message of the meeting was "we are family," that there was an election and that employees should not vote for the Union in the upcoming election. Parks also told employees that "we did not need a union, that we have a good relationship with our employees."

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After Hoffman and Parks concluded their remarks, Respondent showed a video slideshow, set to the popular song, "We Are Family," by the group Sister Sledge. The video lasted about five minutes and included photographs of most of Respondent's employees, either in groups or individual photographs. Title cards, at the beginning of the video, read, "At Oradell Health Care Center...We are more than staff...We are more than co workers. "WE are FAMILY." The final title card read, "Oradell Family a Winning Team."

After the video ended, Parks and Hoffman spoke briefly and reiterated the message of "we are family," that they imparted prior to the video being played. After the video ended and Hoffman and Parks completed their remarks, employees started clapping and chanting, "We are family."

The video itself made no reference to the Union or to the election. At no point in the video did any employee communicate his or her views about the Union or the election. At no time during the meeting did Respondent ask any employees to communicate their views about the Union or the election, and no employee made any comments or statements about the Union or the election.

The photographs used to make the video were taken over two weeks prior to the meeting based upon instructions from Care One officials. The employees were not told the purpose of the photographs and were not informed that their images would be used in a video or that the video would be shown at a meeting of employees, in which the union election would be discussed. Hoffman testified that he was present when most of the photographs were taken and that on those occasions, he asked employees if they mind if their picture was taken. According to Hoffman, most of the employees had no objection to the photography and their pictures were taken. Hoffman further testified that a "handful" of people indicated that they did not wish their pictures to be taken, and in these cases, the employee's picture was not taken.

Employees Gladys Lamont and Simone Antoine testified that when their pictures were taken, they were not asked whether they minded or agreed to have their pictures taken.<sup>3</sup>

It is undisputed that Respondent did not obtain consent from any of the employees to have their images appear in the video and that the video contained no disclaimer of any kind.

The record reflects that Hoffman had in the past taken photographs of employees at parties and events, and even on occasion of employees at their duty occasions and that he would post these pictures on the bulletin board. The bulletin board had the title "Team Oradell"

<sup>&</sup>lt;sup>3</sup> Lamont's picture appeared in the video. Antoine's picture was not included in the video.

on it.

## E. Gladys Lamont's meetings with Respondent

Gladys Lamont was employed by Respondent as a housekeeper from 2008 through September of 2012 when she was terminated by Respondent.<sup>4</sup>

Lamont testified that on or about June 25, 2012, she was called into a meeting with Hoffman, Parks and Lamont's supervisor, Shawn. According to Lamont, Parks began the meeting by asking if she knew why they were meeting. Lamont alleges that she said that she did not. Parks then, according to Lamont, stated that she had heard that Lamont was the person responsible for bringing the Union into the facility. Lamont claims that she replied, "Me, Ms. Afrika," and Parks answered yes. Lamont further asserts that she repeated "me," and Parks replied yes. Lamont then states that she told Parks that if she knew anything about the Union, she would say something to Parks. Parks allegedly replied, "Yes, I know you would let me know."

Lamont further testified that Hoffman then asked if Lamont was sure that she was not involved in the Union. Lamont alleged that she replied, "No."

Lamont conceded on cross-examination that she didn't understand why people thought that she brought the Union in, and, in fact, showed Respondent's officials that she was wearing a vote no button.

Lamont further testified that, at that meeting, she informed Respondent's officials that she was going to Jamaica on June 29<sup>th</sup>, and she had already purchased a ticket. Either Shawn or Parks allegedly informed Lamont that she had to come in to vote on the 29<sup>th</sup> before she leaves. She responded that she will vote in the morning of the 29<sup>th</sup>, park her luggage and leave for the airport. Then, according to Lamont, she was told okay, she can go.

On cross-examination, Lamont admitted that there was an issue raised at the meeting as to whether she had the time to go on a two-week vacation, and there was a second meeting when she would produce documentation to support her request for her two weeks off due to an alleged emerging illness in the family. She further admitted that at the second meeting, a day or two later, she submitted the plane ticket that she had purchased to Respondent. At the second meeting, Lamont claims that she submitted the ticket, but Respondent's officials told her that she had only three days of leave and could only take three days off.

Lamont also admitted on cross-examination that prior to the meetings someone had posted a document near the time clock, stating that she had brought the Union into the facility on three or four occasions. She added that the postings were taken down, shortly after they were posted and that she was very upset about that since she had not signed a card or been a union supporter. She also admitted that Parks told her that she was sorry about the postings and that Lamont was upset.

On questioning from the undersigned, Lamont, at first, testified that the postings and

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<sup>&</sup>lt;sup>4</sup> The Union filed an unfair labor practice charge alleging that Lamont's discharge was violative. Although Lamont testified that she did not know what happened to that charge, it is probable that it was withdrawn, inasmuch as the consolidated complaint did not include her discharge as a complaint allegation.

Parks's action in comforting her about the postings occurred before the June 25 meeting. However, later on, after repeating her version of what Parks had said to her about bringing in the Union, I asked her if she had mentioned the postings at the meeting. Lamont then changed her testimony and insisted that the "apology" from Parks about the postings did not take place until after the meetings and was, according to Lamont, on June 28, the day before the scheduled election.

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Parks testified, on behalf of Respondent, concerning these meetings, and her testimony is quite different from Lamont's testimony in several respects. Parks asserts that Lamont had come to her prior to the June 25 meeting and informed her that she as upset because Shawn had denied her request to go to Jamaica because she did not have sufficient time to go away for two weeks. Parks then called a meeting in Hoffman's office with Shawn and Lamont. According to Parks, Shawn explained that Lamont did not have the time, but if she could present some proof of extenuating circumstances, maybe Respondent could accommodate her request to be away for two weeks. At that point, Parks asserts that Lamont stated, "I'm not for the Union. I do not want the Union," and showed them the vote no sticker that she was wearing. Parks testified that she replied, "This isn't why we are here, we're not here to discuss that." According to Parks, there was nothing more said about the Union by anyone at the meeting.

Parks further testified that she overheard Marsha Wong and Lamont discussing what kind of proof to submit to Respondent and that Wong advised Lamont to submit her plane ticket.

At the second meeting, Lamont submitted the ticket, and Parks informed her that Respondent couldn't pay her for the entire two weeks, but she could use the vacation time that she had and for the reminder of the time, she would not be paid for those days. Lamont replied that she would think about it.

Parks confirmed that about a week or two before the meeting, Lamont reported that there were signs posted accusing Lamont of bringing in the Union, that Lamont was upset about it and was crying and that she (Parks) apologized to her and said that she was sorry this had happened. Parks added that she told Hoffman about the postings and Lamont being upset and crying, and she heard Hoffman make a call and ordered that someone go through the building and make sure that any such postings were removed.

Hoffman testified about other matters but furnished no testimony about these meetings. Shawn did not testify.<sup>5</sup>

## III. Analysis

## A. The Video Slideshow

It is well-settled that an employee has a Section 7 right to choose, free from any employer coercion, the degree to which he or she will participate in the debate concerning union representation. *Tesco PLC d/b/a Fresh & Easy Neighborhood Market*, 358 NLRB No. 65 slip op at 3 (2012); *Smithfield Packing*, 344 NLRB 1, 3-4 (2004). That right includes the "right to express an opinion or to remain silent." *Dawson Construction Co.*, 320 NLRB 116, 117 (1995), quoting *Texaco Inc. v. NLRB*, 700 F.2d 1039, 1043 (5<sup>th</sup> Cir. 1983).

<sup>&</sup>lt;sup>5</sup> I noted that although Parks referred to Shawn as Lamont's immediate supervisor, there is no complaint allegation that Shawn is a 2(11) supervisor or an agent of Respondent nor is there any stipulation to this effect in this record.

In *Allegheny Ludlum Corp.*, 333 NLRB 734 (2001), enfd. 301 F.3d 167 (3<sup>rd</sup> Cir. 2002), the Board applied these principles in assessing the circumstances under which an employer is permitted to include images of its employees in campaign videos.

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The Board will allow employers to solicit employees to appear in a campaign video but only if it is done with the following safeguards:

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1. The solicitation is in the form of a general announcement which discloses that the purpose of the filming is to use the employee's picture in a campaign video, and includes assurances that participation is voluntary, that nonparticipation will not result in reprisals, and that participation will not result in rewards or benefits.

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2. Employees are not pressured into making the decision in the presence of a supervisor.

3. There is no other coercive conduct connected with the employer's announcement such as threats of reprisal or grants or promises of benefits to employees who participate in the video.

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4. The employer has not created a coercive atmosphere by engaging in serious or pervasive unfair labor practices or other comparable coercive conduct.

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5. The employer does not exceed the legitimate purpose of soliciting consent by seeking information concerning union matters or otherwise interfering with the statutory rights of employees.

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Where the employer, who has not properly solicited employees and has not obtained their consent to appear in a campaign video, it may nonetheless use their images in the videotape without incurring Section 7 liability, only if the employer uses safeguards designed to insure that the videotape does not convey the message that the employees depicted therein either support or oppose union representation. Id.

These safeguards are as follows:

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Consistent with the foregoing principles, we hold that employers may lawfully include the images of employees in a campaign video (including "stock footage" taken prior to the campaign for other purposes), even if the employees have not volunteered to participate in the campaign videotape as set forth in Section III A above, under the following circumstances:

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1. The employees were not affirmatively misled about the use of their images at the time of the filming;

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2. The video contains a prominent disclaimer stating that the video is not intended to reflect the views of the employees appearing in it; and

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3. Nothing in the video contradicts the disclaimer. Accordingly, viewed as a whole, the video does not convey the message that employees depicted therein either support or oppose union representation.

Respondent argues that *Allegheny Ludlum* is not controlling because the video viewed as a whole does not convey the message that employees depicted therein either support or oppose union representation. In this regard, Respondent emphasizes that the video does not, unlike the video in *Allegheny Ludlum*, contain an anti-union message and, in fact, does not mention the Union or the upcoming election. Respondent asserts that the video contained no anti-union message but rather conveyed an entirely positive message, focusing entirely upon the facility and its personnel as a family, designed to foster unity within the workforce.

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Respondent further contends that even if *Allegheny Ludlum* is deemed applicable, no violation should be found, even though the video did not have a disclaimer since the video did not convey the message that employees depicted therein either support or oppose union representation. *Allegheny Ludlum*, supra at 745. Respondent emphasizes that in *Allegheny Ludlum*, the employees spoke extensively about their opposition to unionization and their negative experiences in union settings. Here, in contrast, the employees depicted said nothing about the Union or the election. Indeed, the employees make no comments at all during the video.

I do not agree with Respondent's contentions and agree with the position of General Counsel and Charging Party that *Allegheny Ludlum* is dispositive and the Respondent has violated the Act as alleged.

Although the video made no reference either to the Union or the election, "literature or material need not contain an explicitly antiunion message in order to be part of an employer's campaign or otherwise implicate the employee's right to decide whether to express an opinion or not." *Fresh & Easy Neighborhood Market*, supra, 358 NLRB at 2; *2 Sisters Food Group*, 357 NLRB No. 168, slip op at 3-4 (2011). "The key inquiry is whether employees would understand the material to be a component of the employer's campaign." Id at 2.

Here, Respondent's campaign theme as exemplified by prior leaflets and speeches, distribution of shirts to employees that read "We are family" on one side and Oradell on the other, was that the Union was an outsider, a stranger and an intruder and bringing in the Union would interfere with the "family" atmosphere that existed at the facility.

The video was shown at a meeting, including unit and non-unit employees, two days before the election during which management representatives, Parks and Hoffman, reiterated the campaign's message that the employees and Respondent were a "family," and that employees should vote no to keep the Union from changing that relationship. In such circumstances, it is clear that the purpose of the meeting was to encourage employees to vote no and that the video and the accompanying music were part of Respondent's campaign themes that Oradell was a "family" that wanted to keep the Union out. Notably, after the Union withdrew its petition, Respondent informed employees that the Union had withdrawn its petition "because we made it known to the Union that 'we are family,' and we did not want an outsider interfering with our family." Therefore, it is clear, and I find, that employees would have reasonably perceived the video to be a component of Respondent's campaign and that *Allegheny Ludlum* is applicable.

In applying *Allegheny Ludlum* to the instant case, I recognize, as pointed out by Respondent, that the employees depicted here made no statements about the Union or the election, unlike the employees in *Allegheny Ludlum*. However, the Board in *Sony Corp. of America*, 313 NLRB 420, 429 (1993) affirmed the administrative law judge's finding that "a viewer could reasonably conclude that the laughing and smiling faces of unit employees whose

faces appear during the film...were meant to show support for the antiunion message of the film as a whole. A viewer could reasonably receive the message that unit employees were laughing and smiling because they were getting rid of the Union as suggested in the entire film and the words of the song." Id at 429.

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Therefore, the fact that employees made no comments or statements about the Union is inconsequential. I conclude that the unmistakable implication of the "We are Family" video was that the photographed employees supported Respondent's campaign message to remain a family without the intruding Union. Respondent's purpose in displaying these photographs were clearly to link the employees to its antiunion message. Accordingly, I conclude that Respondent by presenting the images of employees in a campaign video without their consent or in compliance with the safeguards set forth in *Allegheny Ludlum*, particularly the absence of a disclaimer in the video, Respondent has coerced employees in violation of Section 8(a)(1) of the Act. *Allegheny Ludlum*, supra; *Fresh & Easy Neighborhood Market*, supra; *Sony*, supra. I so find.

## B. The Meetings with Lamont

The complaint alleges and General Counsel asserts that at the June 25 meeting with
Lamont, Respondent by Parks created the impression among its employees that their union
activities were under surveillance, interrogated its employees about their union membership and
activities and asked its employees to ascertain and disclose to Respondent the union
membership and sympathies of other employees.

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General Counsel argues that Respondent by Parks's comment to Lamont that she learned that Lamont was responsible for bringing in the Union into the facility, constituted both a coercive interrogation, *Sands Motel*, 280 NLRB 132, 140 (1986); *Rossmore House*, 269 NLRB 1176, 1177 (1984) and an unlawful creation that Lamont's union activities were under surveillance, *Sam's Club*, 342 NLRB 620 (2004); *Lucky 7 Limousine*, 312 NLRB 770, 771 (1993). General Counsel further asserts that when Parks said to Lamont that she knew Lamont would tell her what was going on with the Union, Parks was encouraging her to spy on her coworkers and report back to Parks in violation of Section 8(a)(1) of the Act. *Casa San Miguel*, 320 NLRB 534, 556 (1995); *Caribe Staple Co.*, 313 NLRB 877, 884 (1994).

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However, these conclusions are based crediting Lamont's testimony as to these alleged statements by Parks. I find contrary to General Counsel's assertions that Parks's version of the June meetings was more credible than Lamont's testimony, and I do not credit Lamont's testimony that Parks made the above detailed comments to Lamont on June 25.

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I found Parks to be a more candid and believable witness and conclude that her version of the conversation to be credible. I credit Parks that she did not bring up the Union or make any of the comments attributable to her by Lamont, and that the only mention of the Union during their conversation was by Lamont herself when she stated that "I'm not for the Union. I do not want the Union," and she showed Parks the vote no stickers that she was wearing. Parks replied that "this isn't why we are here," and the conversation returned to the issue under discussion at the meeting, Lamont's request for two weeks off to go to Jamaica. I credit Parks that this was the only mention of or discussion of the Union at the meeting.

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I find Park's testimony to be more likely and believable and that Lamont interjected her lack of support for the Union in an attempt to carry favor with Respondent and to allow her to take two weeks of paid leave, even though she did not have the time available to her. I found Lamont to be a less than candid witness, who was confused about when the prior incidents

occurred when someone posted a documents falsely asserting that she had brought in the Union, and Parks had consoled her when she became upset and cried at that time.

In these circumstances, I find it unlikely that Respondent would ask her about bringing in the Union since it knew that she was upset about having been so accused and had denied any union involvement.

General Counsel asserts that since Respondent did not ask Hoffman to testify about the June 25 meeting<sup>6</sup> and did not call supervisor Shawn as a witness, it is appropriated to draw an adverse inference from the failure of these witnesses to testify and conclude that if they had testified, they would have supported Lamont's testimony and not Parks. *Automated Machines*, 285 NLRB 1122, 1123 (1987); *Bally's Atlantic City*, 355 NLRB 1319, 1325 fn. 3 (2010).

However, it is not obligatory to draw an adverse inference from a failure to call a particular witness to corroborate another witness, and in my discretion, I do not deem it appropriate to do so. *AEi2 LLC*, 343 NLRB 433 fn. 2 (2004); *Rice Buick*, 334 NLRB 785, 786 (2001).

I note that a party has no obligation to call every witness at its disposal to prove its case. Roosevelt Hospital, 348 NLRB 1016, 1022 (2006), and its decision to call Parks, the person, who made the allegedly unlawful comments, and whom I have credited, is sufficient.

Since I have not credited Lamont's testimony concerning the statements allegedly made by Parks that General Counsel asserts violated Section 8(a)(1) of the Act, I shall recommend dismissal of these 8(a)(1) complaint allegations.<sup>7</sup>

# Conclusions of Law

- 1. Oradell Health Care Center (Respondent) is an employer within the meaning of the 30 Act.
  - 2. 1199 SEIU United Healthcare Workers East is a labor organization within the meaning of the Act.
  - 3. By showing, during a meeting opposing union representation, a video, containing employees' images without their consent and without a disclaimer that the video did not reflect the views of the employees appearing in it, Respondent has violated Section 8(a)(1) of the Act.

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<sup>&</sup>lt;sup>6</sup> Hoffman testified about other issues.

<sup>&</sup>lt;sup>7</sup> I, therefore, find it unnecessary to rule on Respondent's affirmative defense that these allegations are barred by Section 10(b) of the Act. I would note that this issue is troublesome, and it is questionable whether the untimely allegations, which were first raised in an untimely amended charge in March 2013, relate back to the timely filed charges, which allege different violations of the Act. See *Carney Hospital*, 350 NLRB 627, 630-631 (2007) (fact that events occurred during the same organizational campaign and the same general time period, insufficient to support a finding of factual relatedness).

## Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

10 ORDER

The Respondent, Oradell Health Care Center, Oradell, New Jersey, its officers, agents, successors and assigns shall:

1. Cease and desist from

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- (a) Showing a video, during an election campaign, containing employees' images without their consent and without a disclaimer stating that the video does not reflect the views of the employees appearing in it.
- (b) In any like or related manner, interfering, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.
  - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days after service by the Region, post at its Oradell, New Jersey facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 27, 2012.
- (b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>&</sup>lt;sup>8</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>&</sup>lt;sup>9</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

It is further ordered that the complaint is dismissed insofar as it alleges violations of the Act not found. Dated, Washington, D.C. September 20, 2013 Steven Fish, Administrative Law Judge 

## **APPENDIX**

#### NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT show a video, during an election campaign, containing employees' images without their consent and without a disclaimer stating that the video did not reflect the views of the employees appearing in it.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

|       |    | Oradell Health Care Center |         |
|-------|----|----------------------------|---------|
|       |    | (Employer)                 |         |
| Dated | By |                            |         |
|       |    | (Representative)           | (Title) |

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov">www.nlrb.gov</a>.

20 Washington Place, 5th Floor Newark, New Jersey 07102-3110 Hours: 8:30 a.m. to 5 p.m. 973-645-2100.

# THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.